ASEAM CREDIT SDN BHD

v.

EMINENT AVENUE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S2-S7-24-2741-2000]
5 NOVEMBER 2002

LAND LAW: *Charge - Order for sale - Cause to the contrary - Failure of plaintiff/financier to comply with ss. 16, 17, 21, 22 and 23 Moneylenders Act 1951 - Whether constitutes 'cause to the contrary' within meaning of s. 256(3) National Land Code 1965*

MONEYLENDERS: *Moneylenders Act - Application and exemption - Exemption gazetted by Minister - Whether applies to moneylender/chargee - Whether failure of moneylender to comply with provisions of Moneylenders Act constitutes 'cause to the contrary' within meaning of s. 256(3) National Land Code 1965 - Moneylenders Act 1951, ss. 2A, 16, 17, 21, 22 and 23*

This was an application by the plaintiff/financier to foreclose and to auction off a piece of property charged to it by the defendant as security for a RM7.5 million loan given to a borrower. The order for sale sought was opposed by the defendant on the ground that there was 'cause to the contrary' within the meaning of s. 256(3) of the National Land Code 1965 ('NLC') – on account of the plaintiff's failure to comply with ss. 16, 17, 21, 22 and 23 of the Moneylenders Act 1951 ('MA51'). The plaintiff, however, argued that it was exempted from complying with the provisions of the MA51 by reason of the exemption in s. 2A(2) of the MA51.

Held:

[1] The relevant exemption gazetted by the Minister under s. 2A(2) of the MA51 was effective from 29 August 1997 to 28 August 2001 whilst the loan agreement between the plaintiff and the defendant was executed on 27 February 1995. It was, thus, clear that the plaintiff had to comply with the provisions of the MA51 for the purposes of the said loan agreement, which it did not. Hence, there was 'cause to the contrary' within the meaning of s. 256(3) of the NLC. (*Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 SC followed.) (pp 467 b, 468 a-e & 471 c)

[Plaintiff's application for order for sale dismissed.]

Case(s) referred to:
Arjan Singh, Son of Inder Singh v. Hashim Angullia & Ors [1941] 10 MLJ (SSR) 55 ***(foll)***
Gulwant Singh v. Amar Kaur [1968] 1 MLJ 107 ***(refd)***
Kartar Singh v. Mahinder Singh [1959] 25 MLJ 248 ***(foll)***
Karuthan Chettiar v. Parameswara Iyer [1966] 2 MLJ 151 ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(foll)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(foll)***
Ramasamy Chettiar v. Wong Poh Fatt [1960] 26 MLJ 43 ***(foll)***
Subchent Kaur v. Chai Sau Kian [1958] 24 MLJ 32 ***(foll)***
Teja Singh v. Rattan Singh [1961] 27 MLJ 39 ***(foll)***

Legislation referred to:
Moneylenders Act 1951, ss. 2A(2), 16, 17, 19, 21(1), 22, 23
National Land Code 1965, s. 256(3)

For the plaintiff - Caroline Jim; M/s Paul Chong & Nathan
For the defendant - Ranjan Chandran; M/s Ranjan Chitravathy & Co

Reported by Gan Peng Chiang

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of an originating summons in encl. (1), the plaintiff sought a foreclosure order against a property held under HS(D) 83488, No: PT 43, Mukim of Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan, and the plaintiff also sought to have that property sold by way of public auction. That property belongs to the defendant which is the registered proprietor and that property was charged by the defendant as security to the plaintiff which had executed a loan agreement dated 27 February 1995 with a borrower by the name of Tow Kong Liang (see the loan agreement marked as exh. "LCC1" of encl. 6). The loan sum was in the region of RM7.5 million and it was to enable the borrower to buy shares in a company known as Austral Amalgamated Berhad. It was the borrower who had requested the defendant to furnish a charge in favour of the plaintiff as security for the loan that was taken. The charge was dated 20 April 1998 and it was exhibited as exh. "LCC 3" of encl. 6.

Cause To The Contrary

It was the stand of the defendant that the order for sale should be refused since there was cause to the contrary pursuant to s. 256(3) of the National

Land Code 1965. It was said that the cause to the contrary hinged on the fact that the plaintiff had failed to comply with the Moneylenders Act 1951 (Act 400).

The loan agreement shows that the plaintiff is a licensed moneylender and that being the case, it is a correct proposition of the law to say that the plaintiff is bound by the various provisions of the Moneylenders Act 1951 (Act 400) (hereinafter referred to as the "Act"). It would not be out of place to categorically state the following state of affairs:

(a) that by virtue of s. 16 of the Act, the plaintiff had not given a copy of the note or memorandum of the moneylenders' contract to the borrower;

(b) that contrary to s. 17 of the Act, the plaintiff had imposed compound interest in the loan agreement with the borrower;

(c) that in contravention of s. 21 of the Act, the plaintiff had failed to produce the accounts as prescribed under s. 19 when the plaintiff commenced this suit;

(d) that contrary to s. 22 of the Act, the plaintiff had imposed interest on the loan sum at the rate of 16% per annum since any interest above 12% per annum must be presumed to be excessive; and

(e) that the plaintiff had contravened s. 23 of the Act by imposing costs, charges and other expenses.

But the plaintiff took the opposite stand and argued that they were not bound by the provisions of the Act. The plaintiff relied vigorously on the exemptions given by the Ministry of Housing and Local Government pursuant to s. 2A(2) of the Act where the Minister had gazetted an exemption effective from 29 August 1997 until 28 August 2000 (see the averment at para. 10 of encl. 4) and that exemption was extended until 28 August 2001 (see the exhibit marked as "LCC13" of encl. 10). That exemption was confined to credit leasing and share financing and, in the context of the present case, even though the money was borrowed to purchase the shares from Austral Amalgamated Berhad yet the plaintiff argued that the rigours of the Act did not apply.

Was it really true that the exemptions that were put into motion by the Minister on 29 August 1997 and extended until 28 August 2001 would exclude the application of the Act to the benefit of the plaintiff? For this exercise, the facts must, once again, be sieved through. It must be recalled that the loan agreement as reflected in exhibit marked as "LCC1" of encl. 6 described the

plaintiff as a moneylender. That loan agreement was dated 27 February 1995 and this must be read with the charge as seen in exhibit marked as "LCC3" of encl. 6 because s. 1.3 of the Annexure to the charge employed the words "memorandum of loan agreement". The charge was dated 20 April 1998 and this must be read with the averment at para. 9 of encl. 4 which was worded in this way:

> Between the period of 27th February 1995 to 29th August 1997, the plaintiff did not have any exemption under section 2A(2) of the Moneylenders Act 1951.

This averment received no response by way of an affidavit from the plaintiff and in fact Miss Caroline Jim, the learned counsel for the plaintiff, conceded that there was no rebuttal of this averment in the plaintiff's affidavit. That being the case, and on the authority of *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609, it was an admission on the part of the plaintiff that when the loan agreement was signed on 27 February 1995, the Minister had yet to issue the exemption and so the irresistible inference was that the Act must apply to the facts of the case. There were no two ways about it. It was therefore part and parcel of my judgment that the Act should apply when adjudicating the originating summons in encl. (1). When the rigours of the Act are brought to bear upon the plaintiff, the following line of authorities would surface.

In *Kartar Singh v. Mahinder Singh* [1959] 25 MLJ 248, Good J had this to say of the Act:

> I have come to the conclusion that I need only deal with one of the points raised by the appellant, which is contained in paragraph 5 of the Memorandum of Appeal. Section 16(1) of the Moneylenders Ordinance requires the delivery to the borrower of a copy of the memorandum authenticated by the lender or his agent. Authentication requires not merely that a signed copy of the memorandum should be delivered to the borrower but that the lender should endorse upon it something in the nature of a certificate confirming that what the borrower receives is a copy of the original memorandum. In expressing this opinion, I am following the opinion of McElwaine C.J., in *Ang Khye Pang v. Chop Ban Aik* [1939] MLJ 282, 285. The decision in that case did not turn upon the form of the authentication but upon the fact that it was not signed by the lender. The dictum of McElwaine C.J., is therefore *obiter* but I am respectfully in agreement with it. There is no prescribed form of authentication, and it will therefore be for the Court to say in the particular circumstances of a case of this kind coming before it whether or not the form of authentication adopted in that particular case is sufficient.
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> The onus is upon the plaintiff to prove that the requirements of the Ordinance have been complied with, and there is no evidence of authentication by the respondent in this appeal of the copy of the memorandum delivered to the appellant. In this connection, he says: 'A memorandum was prepared as

required by law (Exh. P.1) ... I gave him a copy of it ... . The defendant acknowledged receipt of the copy of the memorandum by putting his signature on the memorandum … One copy of the memorandum was given to the defendant.' It is not necessary that a copy of the form of authentication on the copy of the memorandum should be placed on the memorandum itself, but there must be evidence that the separate and additional act of authentication was done by the lender in relation to the copy of the memorandum. In the absence of any such evidence the respondent was precluded from enforcing the contract. In *Ang Khye Pang*'s case, *supra*, Terrell J.A. said: 'In the case before the Court no authentication has been signed by the lender and accordingly the contract is not enforceable.' And Poyser C.J. (F.M.S.) in a concurring judgment said:

> The authentication clause of 'B1' was not signed by the lender, nor was there anything on the document in the nature of an authentication by the lender. The lender only signed 'B1' at the foot of the copy of the promissory note. The trial Judge held that as 'B1'.
>
> Contained an exact copy of the contract and bore on its face the signature of both plaintiff and defendant, it was a substantial and adequate compliance with the requirements of section 4, so far as authentication was concerned.
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> I do not agree; the provisions of the Moneylenders Ordinance must be strictly complied with. There are a number of authorities, both English and local, to this effect, and in this case such provisions were not strictly complied with.

On that ground alone the learned President ought to have dismissed the suit. It is as McElwaine C.J., said in *Ang Khye Pang*'s case a 'most immeritorious ground', and in this appeal I entertain the same regret which was expressed by Poyser C.J. (F.M.S.) in that case at having to allow the appeal. On the learned President's findings of fact the merits are all with the moneylender but moneylenders must learn the importance of strict compliance with the technical requirements of the Ordinance if they with to recover their money. The appeal is allowed with costs to the appellant both here and in the Court below.

In *Subchent Kaur v. Chai Sau Kian* [1958] 24 MLJ 32, at p. 34 where Smith J had this to say:

> Since no note or memorandum of the moneylender's contract was given to the respondent, the contract for repayment of the money lent and the security given by the borrower to the applicant are by virtue of the said section 16(1) unenforceable and the respondent is entitled to a declaration.
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> I do, therefore, order that the application for an order that the land be sold at public auction be dismissed and do declare that the contract for repayment by the respondent of the principal and interest purported to be secured by a memorandum of charge (dated 31st day of August, 1952, and made between

the respondent of the one part and the applicant of the other part and registered as Negri Sembilan Presentation No. 95101) and the charge over the land described in the said memorandum of charge are unenforceable.

In *Teja Singh v. Rattan Singh* [1961] 27 MLJ 39, Thomson CJ, delivering an oral judgment aptly said:

> For myself I do not consider it necessary to examine the grounds of appeal in detail. The law in this country is perfectly well-settled and has been settled since as long ago as 1941. It is no case of a moneylender being taken by surprise by a new technical defence. The law has been well known to the moneylending community since 1941 and was discussed as recently as 1956 in the case of *Ramasamy Chettiar v. Wong Poh Fatt* [1960] MLJ 43 where Pretheroe J., after referring to the decision of Terrell J., in the earlier case of *Arjan Singh v. Hashim Angullia & Ors*. [1941] MLJ 55 held (I am reading from the headnote):
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> > When a moneylender embarks on any proceedings in any Court, a statement of his account as prescribed by section 21(1) of the Moneylenders Ordinance, 1951, must be produced at the time the Originating Summons was filed. Non-compliance with this statutory requirement is an irregularity which the Court cannot waive and will entitle the respondent to have the Originating Summons dismissed with costs.
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> It is beyond doubt that this case falls clearly within these words. The account was not produced when the Originating Summons was issued and that was fatal to any subsequent proceedings on that summons. In the circumstances I am disposed to go no further than to say that the appeal should be dismissed on that ground with costs. The deposit in Court should be paid out to the respondent against his taxed costs.

It is germane to mention that under s. 21(1) of the Act, the requirement would be that where proceedings are taken in any court by a moneylender for the recovery of any money lent, that moneylender shall produce a statement of his account under s. 19 of the Act. Non-compliance with this statutory requirement is an irregularity which the court will be reluctant to waive and will entitle the borrower defendant to have the action dismissed with costs (*Arjan Singh, Son of Inder Singh v. Hashim Angullia & Ors* [1941] 10 MLJ (SSR) 55; *Ramasamy Chettiar v. Wong Poh Fatt* [1960] 26 MLJ 43; and *Teja Singh v. Rattan Singh (supra)*). It is ideal to mention that when the statement of account is annexed it becomes part and parcel of the statement of claim and it becomes immaterial if it was not signed (*Gulwant Singh v. Amar Kaur* [1968] 1 MLJ 107). Incidentally, it is also thought provoking to read the case of *Karuthan Chettiar v. Parameswara Iyer* [1966] 2 MLJ 151.

Another principle of law worth mentioning is this. That it is for the moneylender to justify by an affidavit of facts the rate of interest charged and the moneylender is also under the duty to affirm an affidavit showing that his claim is not harsh and unconscionable or substantially unfair.

That would be the ramifications of being a moneylender.

Conclusion

I was satisfied that the application of the Act to the facts of the present case constituted "cause to the contrary" within the meaning of s. 256(3) of the National Land Code 1965 and this would fall under the third category as set out by the Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36.

Since there was no compliance with the provisions of the Act, the plaintiff's originating summons in encl. (1) was destined to fail. Without hesitation, I dismissed encl. (1) with costs.